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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.12.2020

DATE OF DECISION : 10.03.2021

CORAM:

THE HON'BLE MR.JUSTICE T.RAJA

C.M.S.A.NO.27 OF 2008

1.Y.S.Masi  
2.Y.S.Lakshmi  
3.Parvathi

.. Appellants/claimants

Vs

1. The Tamil Nadu Housing Board,  
Coimbatore. Rep. By its Executive Engineer,  
Administrative Officer,  
Coimbatore.

.. 1<sup>st</sup> Respondent/Decree Holder

2.Y.B.Ramakrishnan

.. 2<sup>nd</sup> Respondent/Judgment Debtor

Prayer : Civil Miscellaneous Second Appeal is filed under Order 41 Rule 27 read with Section 100 of Civil Procedure Code against the judgment and decree dated 01.04.2008 made in C.M.A.No.2 of 2008 on the file of the District Judge, Nilgiris at Udthagamandalam, confirming the fair and decreetal order dated 16.10.2006 made in E.A.No.279 of 1999 in E.P.No.87 of 1998 in O.S.No.25 of 1989 on the file of the Sub-Court, Nilgiris at Udthagamandalam.

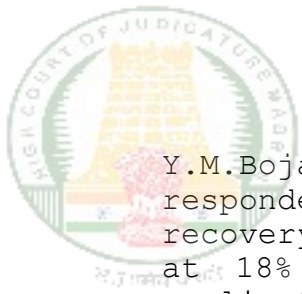
For Appellants : Mr.Krishnaprasad  
for M/s.Sarvabhauman Associates

For R1 : Mr.R.Jayaseelan

For R2 : No Appearance

#### JUDGMENT

The appellants are the claimants, but, they were not arrayed as parties in O.S.No.25 of 1989. The suit property originally belonged to one Morcha Gowder, who died leaving behind his sons, namely, Y.M.Boja Gowder and Y.M.Subramaniam. The second respondent/Y.B.Ramakrishnan is one of the legal heirs of



Y.M.Boja Gowder. Whiles, the Tamil Nadu Housing Board/first respondent herein filed a suit in O.S.No.25 of 1989 seeking for recovery of Rs.5,85,552/- and obtained an decree with interest at 18% per annum from the date of suit till the date of realisation. Thereafter, the decree holder/Tamil Nadu Housing Board filed E.P.No.25 of 1989 for attachment and sale of the following properties:-

| R.S.No.              | Total extent and extent owned |
|----------------------|-------------------------------|
| 157/2                | 1.98 acres                    |
| 157/6                | 2.48 acres                    |
| 157/5                | 2.55 acres                    |
| 207/9                | 2.60 acres                    |
| of Yadapalli Village |                               |
| Total                | 9.61 acres                    |

Since the properties were attached on 13.12.1999, E.A.No.279 of 1999 was filed by the appellants on 21.12.1999 under Order 21 Rule 58 read with Section 151 of the Civil Procedure Code (CPC) to release one of the items of the attached properties viz. 2.60 acres in S.No.207/9 of Edappally Village.

2. It is further averred by the appellants in the Execution Application (EA) that the petition mentioned property was originally allotted to their share under the family arrangement in the year 1952, subsequently, that was partitioned in the year 1988. Even on earlier occasion, oral partition effected was reduced into writing in the form of Memorandum dated 08.08.1988 confirming the allotment of petition mentioned property in their favour. Thereafter, the claimants/appellants have filed a suit in O.S.No.130 of 1995 seeking for declaration of their title and for consequential injunction in respect of the petition mentioned property. The said suit was subsequently transferred to the file of District Munsif Court, Coonoor, and renumbered as O.S.No.340 of 1995 and in the said suit, interim injunction was granted in favour of the appellants herein and the judgment debtor/second respondent herein was a party in the said suit. Since the second respondent has no share or interest, the land in S.No.207/9 absolutely belongs to the appellants, hence, the petition mentioned property cannot be sold in execution of the decree obtained against the second respondent by the first respondent/Tamil Nadu Housing Board.

3. The first respondent/Tamil Nadu Housing Board filed a counter affidavit taking a stand that the claimants/appellants herein do not derive any right over the alleged oral partition or family arrangement in respect of the petition mentioned property, because, the land in question is absolute property of



the second respondent. Whiles, EA has been filed by the appellants with an attempt to defeat the decree obtained by the first respondent/Tamil Nadu Housing Board against the second respondent, hence, the same is liable to be dismissed.

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4. The second respondent/judgment debtor has filed a counter affidavit contending that the subject property in S.No.207/9 of Edappally Village, originally belonged to Morcha Gowder, grandfather of the second respondent, who died intestate leaving behind his two sons, namely, Y.M.Boja Gowder and Y.M.Subramaniam. Y.M.Bhoja Gowder is the father of the second respondent who died intestate leaving behind Y.B.Bheeman, Y.B.Krishnamurthy and Y.B.Nanjammal @ Nancy. Pending this appeal, Y.M.Subramaniam, first claimant, died leaving behind the claimants 2 to 4/appellants herein. Therefore, since the said Morcha Gowder is none other than the grandfather of the appellants herein, they are entitled to have 1/7<sup>th</sup> share in the half share of Late Y.M.Boja Gowder, which has been in joint possession and enjoyment of the second respondent and other legal heirs of Late Y.M.Boja Gowder till date. It is further averred that neither the property in question was allotted to the claimants in the year 1952 nor the partition took place and reduced into writing in the form of Memorandum dated 08.08.1988 as alleged by them.

5. It is further submitted that the alleged allotment as well as the subsequent partition were all created to defraud the second respondent and other legal heirs of Y.M.Bhoja Gowder as they are all void document, hence, the documents, namely, Exs.A1 to A4 relied on by the claimants are not enforceable in law as it is hit by Section 17 of the Registration Act. In the absence of the second respondent and other legal heirs, the claimants have filed a suit in O.S.No.130 of 1995 and obtained an order of injunction and therefore, they are not entitled to any relief in the present suit and on this basis, the second respondent sought for dismissal of EA filed by the claimants/appellants herein.

6. Pending appeal before the learned first appellate Court, the claimants have filed I.A.No.24 of 2008 in C.M.A.No.2 of 2008 praying to receive the certified copy of the sale deed dated 26.12.2007 executed by the judgment debtor/second respondent along with his brothers and sisters showing that there was an oral partition between the heirs of Y.M.Bhoja Gowder and Y.M.Subramani, and also to receive the disclaimer statement executed between the second respondent, his brothers and the sister on the one side, and the claimants/appellants on the other side.

7. Learned trial Court/execution Court framing the following issues;



- (i) whether the petition is maintainable or not?
- (ii) to what relief the petitioners are entitled for?

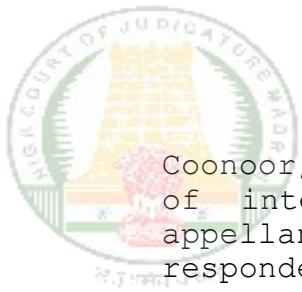
and after perusing Exs.A1 to A3, namely, certified copies of sale deed dated 20.02.1989 and 11.01.1993 relating to some other property; and certified copy of disclaimer statement filed in O.S.No.340/95 on the file of District Munsif, Coonoor, dismissed EA filed by the appellants herein holding that EA was filed without any merit whatsoever. As against which, an appeal in C.M.A.No.2 of 2008 was filed before the learned District Court, Nilgiris at Udhagamandalam. Learned first appellate Court also dismissed the appeal holding that the claimants failed to prove with sufficient material evidence that the property in question is not liable for attachment, therefore, the property cannot be released from attachment. As against which, the present appeal has been filed raising the following substantial questions of law:-

a) Whether the learned District Judge is correct in law in dismissing the appeal on the ground that the appellants have failed to prove that the subject property belongs to him especially when Exs.A1 to A4 have been marked to prove the same?

b) Whether the Courts below are correct in law in rejecting Ex.A3 on the ground that it is an unregistered document totally overlooking the fact that a document which merely evidences an earlier oral partition need not be registered as per the provisions of Section 17 of the Registration Act?

c) Is not the order of the Courts below vitiated by reason of the fact that they have not framed proper points for consideration?

8. Learned counsel for the claimants/appellants submitted that when the first respondent/Tamil Nadu Housing Board has filed a suit in O.S.No.25 of 1989 on the file of learned Sub-Court, Nilgiris, Udhagamandalam, seeking for recovery of Rs.5,85,552/- against the second respondent/judgment debtor and also sought for order of attachment of the suit property in S.No.207/9 measuring an extent of 2.60 acres of land, Yedapalli Village, admittedly, the appellants herein were not the parties. It is their case that the property in question absolutely belongs to them as the subject property was allotted under a family arrangement in the year 1952 and subsequently, it was partitioned orally in the year 1988, that has been reduced into writing in the form of Memorandum on 08.08.1988, confirming the same. They have also filed a suit in O.S.No.130 of 1995 seeking for declaration of their title and for consequential injunction in respect of the subject property. However, this was subsequently transferred to the file of District Munsif's Court,



Coonoor, and renumbered as O.S.No.340 of 1995, whereby, an order of interim injunction was also granted in favour of the appellants herein. In the said suit proceedings, the second respondent/judgment debtor was also a party.

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9. Adding further, he submitted that subsequent to the order dated 01.04.2008 passed in C.M.A.No.2 of 2008 by the learned first appellate Court dismissing their prayer to release the property in question from attachment, learned District Munsif Court, Coonoor, in O.S.No.340 of 1995, dated 07.09.2016, passed the final order decreeing the subject property in favour of the appellants. Therefore, the property in question cannot be attached as it is an absolute property of the claimants/appellants. On this basis, he has prayed for quashing the concurrent findings of the Courts below refusing to order for releasing the property in question from attachment.

10. Learned counsel for the first respondent/Tamil Nadu Housing Board submitted that the documents, namely, Ex.A1 and A2 relied on by the claimants are not at all relevant to the property in question and they are pertaining to some other properties. He further submitted that Ex.A3-disclaimer statement relied on by the claimants is an unregistered and unstamped document, hence, it cannot be used for any purpose to support their case as it is hit by Section 17 of the Registration Act, for, if any family arrangement reduced into writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the India Stamp Act and Indian Registration Act. Therefore, learned Courts have rightly held that the said unregistered and unstamped document relied on by claimants cannot be taken on record, hence, such a well reasoned concurrent findings rendered by the Courts below need not be interfered with, he pleaded.

11. Despite serving fresh notice, no one represented on behalf of the second respondent/judgment debtor.

12. Heard the learned counsel appearing on either side and perused the materials available before this Court.

13. It is not in dispute that the property comprised in S.No.207/9 measuring an extent of 2.60 acres situated at Edappalli Village is the subject matter of the property. It is the claim of the claimants/appellants that the property in question was allotted to them in the year 1952 and the same was partitioned in the year 1988. In support of their claim, they have relied on Ex.A1-certified copy of sale deed dated 20.02.1989; Ex.A2-certified copy of sale deed dated 11.01.1993; Ex.A3-certified copy of disclaimer statement filed in



O.S.No.340/95 on the file of learned District Munsif Court, Coonoor; and Ex.A4-certified copy of petition and orders in I.A.No.339/95 in O.S.No.130/95 on the file of learned District Court, Ooty. But, both the learned Courts below, after perusing the materials placed before it, have concurrently held that the claimants/appellants herein have not produced any material evidence to show that they are in absolute possession of the property in question.

14. This Court is also able to see that Exs.A1 and A2 relied on by the appellants are not at all relevant to the property in question and they are relating to some other property. Besides, Ex.A3-disclaimer statement said to have been executed between the claimants/appellants and the second respondent/judgment debtor, in which, the second respondent said to have relinquished his right over the property in question, is an unregistered and unstamped document, hence, the same cannot be looked into for any purpose, for, the said document-Ex.A3 is in the nature of creating and extinguishing right in the property in question. Thus, it requires compulsory registration as per Section 17 of the Registration Act, which is extracted hereunder:-

"17. Documents of which registration is compulsory.-(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;



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(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

A perusal of the above said provision shows that any instrument of gift of immovable property shall be registered. Similarly, other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, in the immovable property, shall be registered. Therefore, in the case on hand, as highlighted above, as per Ex.A3-disclaimer statement dated 08.08.1988, the second respondent, his brothers and sister disclaimed their right over the property in question and some other properties. Thus, disclaimer statement-Ex.A3 reduced into writing purports to create and extinguish right over the property in question, therefore, it requires compulsory registration as adumbrated under Section 17(1)(b) of the Registration Act, failing which, the claimants/appellants have to face mischief consequences of Section 49 of the Registration Act. Hence, as rightly held by the learned Courts below, the document relied on by the claimants, namely, Ex.A3, which is neither stamped nor registered, cannot be looked into for the purpose of proving the title in favour of the appellants.

15. Moreover, as stated above, in view of non-registration of the said document-Ex.A3, as per Section 49 of the Registration Act, neither the said document confers any power to the claimants/appellants nor it can be taken as evidence for establishing their right over the property in question. For better understanding, Section 49 of the Registration Act is extracted below:-

"49. Effect of non-registration of documents required to be registered.—No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—  
(a) affect any immovable property comprised therein, or  
(b) confer any power to adopt, or  
(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."



16. One of the arguments of the learned counsel for the appellants is that in view of the final decree passed by the learned District Munsif Court, Coonoor, in O.S.No.340 of 1995, dated 07.09.2016, decreeing the property in question in favour of the claimants/appellants, the order of attachment passed by the learned Courts cannot be sustained. The said argument of the learned counsel for the appellants is bereft of any merit, for, the very same property in question has already been decreed in favour of the Tamil Nadu Housing Board/first respondent herein in O.S.No.25 of 1989, dated 15.11.1996, therefore, the judgment and decree passed in O.S.No.340/1995, dated 07.09.2016, relied on by the claimants/appellants, that too, after a period of 8 years from the date of order passed by the learned first appellate Court in C.M.A.No.2 of 2008, dated 01.04.2008, cannot be taken on record. Besides, in the said judgment, it is to be noted that neither in the pleadings of the parties nor in the observation made by the Court mentioned/discussed anything about the earlier judgment passed in O.S.No.25 of 1989 decreeing the property in question in favour of the Tamil Nadu Housing Board/first respondent herein.

17. Thus, for the reasons stated above, answering the substantial questions of law against the claimants/appellants, the Civil Miscellaneous Second Appeal stands dismissed confirming the concurrent impugned judgments and decrees passed by the learned Courts below. No Costs.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

rkm

To

1. The District Judge,  
District Court, Nilgiris at Udhamandalam.
2. The Subordinate Judge,  
Sub-Court, Nilgiris at Udhamandalam.
3. The Section Officer,  
VR Section, High Court, Madras-104.

+1cc to Mr.R.Jayaseelan, Advocate, S.R.No.15518

+1cc to M/s.Sarvabhauman Associates, Advocate, S.R.No.15215

C.M.S.A.No.27 of 2008

BR(CO)

CS/08/10/2021